

Virtual Hearings: An Arbitrator's Perspective

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The challenge of Covid-19

We are just beginning to appreciate the potentially catastrophic effect of Covid-19 on a core feature of the arbitral procedure – the in-person hearing. Disruption to travel seemed likely to be brief and geographically limited, but the reality is that it will be impossible for some time to conduct in-person the hearings currently scheduled and soon to be scheduled. Fortunately, international arbitration is flexible and innovative. This article examines the perceived deficits of current technologies, the recent developments, and the way forward for the special requirements for virtual hearings.

Two preliminary observations: we are familiar with remote participation for in-person hearings where it is impossible or impractical for one or more of the participants to attend in person. However, the challenge today is different: for the coming months at least, it will be impossible or imprudent in most arbitrations for any of the participants to be in the same room, even if some of them are in the same city. The question, therefore, is not one of conducting a videoconference – it is one of conducting of a *virtual hearing*. This is not just a difference in degree, but a difference in kind from the challenges we have faced before.

Secondly, remote participation was once a question of balancing logistical and forensic issues: eg, Should the witness statement be admitted even if the witness cannot attend in person? However, the challenge today is different: virtual hearings are now necessary in most cases if there is to be a live hearing at all and without undue delay. This shifts the focus from whether to permit remote participation to questions of how, in the context of virtual hearings, we can best meet the forensic and procedural fairness needs of international arbitrations.

Addressing the perceived shortcomings of established technologies

Most arbitrators are unfamiliar with virtual hearings.¹ They may have experienced cloud-based document sharing and videoconferencing, but the concept of hearings conducted with everyone in different locations is unknown to them. Moreover, their experience of remote participation is often marred by technological failures making them leery of increasing their dependence on technology. What if the video-link fails or is of poor quality? What if access to the documents is cut off without warning? Who will address technical issues when everyone is in separate locations?

Further logistical questions include managing participation from different time zones. Those who have served in arbitrations with counsel teams located around the globe will be familiar with the challenge of finding times for even brief teleconferences that fall within the waking hours of the participants. Arbitrators who draw the short straw, (typically those from Australasia) may soon expect to find themselves nightly in hearings scheduled during the “business hours” of the parties and their counsel.

Finally, in evaluating witness testimony, particularly under cross-examination, there is a concern that the loss of in-person observation will impair the tribunal's ability to assess the credibility and strength of the evidence. It may be difficult to capture the ‘look and feel’ of the witness's evidence onscreen and to discern body language, facial expressions and tonal changes. Further, remote participation raises concerns of ensuring that the witness is not being coached off-camera or reading from a script that is hidden from the tribunal's view. This casts doubt on the soundness and utility of a witness' virtual evidence.

Adopting virtual hearing room technology

Service providers such as Epiq and Opus, some working in conjunction with hearing centres such as Maxwell Chambers and HKIAC, have made great strides in addressing these technological challenges. They are now offering more comprehensive solutions involving dedicated operators participating

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¹ The Queen Mary, University of London 2018 International Arbitration Survey found, at 31- 32, that 78% of respondents had never or only rarely used virtual hearing rooms.

remotely to manage the videolink and deploy the documents from electronic hearing bundles. This can make the documents on which the witness is being examined or to which counsel is referring available to the participants in the hearing more efficiently than the traditional process of asking everyone to thumb through the bound volumes. This can also ensure that technology glitches are addressed promptly and efficiently. Options for real-time transcripts can include onscreen captioning to promote aural comprehension. Rotating cameras can assist in assessing the physical environment in which the witness is located. All this is a significant advance on conventional videocalls.

Further, some critical features of audiovisual technology using applications such as Zoom and Bluejeans are rapidly improving the functionality of established technologies. A key feature of an in-person hearing with many participants is the opportunity to scan the room – to observe several participants in rapid succession. The Zoom and Bluejeans platforms are fast becoming a mainstay of business meetings² and distance learning.³ They permit up to 25 or 49 participants to be displayed in a grid of images with options for expanding the image of individual participants, such as those who are speaking. To be sure, arbitrators and counsel will need screens of sufficient size and quality to make the best use of these features; and in large hearings, counsel will need to develop protocols for determining which core members of the teams are displayed onscreen. Nevertheless, it is probably fair to say that even in the largest of hearings, the Tribunal is rarely able to observe accurately more than 49 participants at once.

Furthermore, to the extent that the operator or another dedicated attendant is calling up the relevant documents onscreen, these can be displayed along with the images of the participants; and the integration of powerpoint or multimedia presentations is, in principle, seamless. Moreover, with the recording of the hearing, the synchronized video of the document, the witness, the counsel, and others can create a more precise record of the events than would exist in hearings today.

The early experience with the mass deployment of these technologies is promising. For the first time, the 2020 Vis Moots are taking place by video-link, and initial anecdotal reports from pre-moots have been very positive. Significant diplomatic meetings have taken place virtually as well, including the G7 leaders meeting about the COVID-19 response,⁴ and that of the foreign ministers of South Korea, Japan and China.⁵

In addition to the simplicity of operating these programs, and the features already mentioned, this video platforms readily accommodate breakout rooms for the parties and the tribunal. The high-definition images and sound address concerns over the capacity to display the participants' facial expressions, body language, voice tone, and other subtle non-verbal cues, making it almost as if they were in the same room; and rotating cameras, which can be controlled by the tribunal, alleviate concerns of witness coaching or behind-the-scenes collusion by confirming that a witness is alone or accompanied only by an approved assistant. Further, the improved quality of the connection in many locations has largely eliminated the time lag that has plagued long-distance communications over the years.

Clearly, not all technological needs can be met so effectively. For participants located in places with poor connectivity, there is no magic solution. For them, the quality and reliability of the sound and picture will necessarily lag behind that in better serviced areas. This larger question of connectivity is likely to be given higher priority as a public service as the challenges of travel and distance participation increase across the range of commercial and consumer activities. And, as with any new technology, virtual hearing technologies are bound to improve in reliability, ease of use, and overall quality with increased deployment.

Some of the most encouraging aspects of these developments are the significant financial and environmental benefits to be expected from reductions in the travel associated with virtual hearings. The necessary technologies are available at minimal expense – a fraction of the cost of travel for the

² <https://www.cnbc.com/2020/03/21/why-zoom-has-become-darling-of-remote-workers-amid-covid-19-outbreak.html>

³ <https://zoom.us/docs/en-us/covid19.html>

⁴ <https://www.businessinsider.com.au/photo-of-g7-meeting-shows-coronavirus-is-impacting-world-leaders-2020-3?r=US&IR=T>

⁵ <https://www.channelnewsasia.com/news/asia/south-korea-china-japan-discuss-covid-19-response-12559190>

many participants to distant hearings and accommodations there for long periods; and the reduced toll on the environment by eliminating the need for long-distance travel speaks for itself.

Adapting to the new normal of virtual hearings and videoconferences

Understanding the technological possibilities is only one aspect of embracing the new reality. Who can we expect to advance the use and availability of these technologies? Who will take leadership in establishing the protocols for conducting hearings in these new formats so as to promote efficiency and procedural fairness?

Not surprisingly, some of the leading hearing centres, are stepping up and, in some cases partnering with major service providers to facilitate virtual hearings. While much of their business, traditionally, has been in the management of physical space, their core expertise is the logistical management of hearings and they are eager to include virtual hearing facilities among the services they provide. For example, Arbitration Place in Canada, now offers *Arbitration Place Virtual*,⁶ and the Australian Disputes Centre offers *Australian Disputes Centre Virtual*⁷ for any type of dispute resolution proceeding to be held remotely. These include software and hardware videoconferencing capabilities, live document display and sharing, transcription services and technological support.

Many domestic courts have also shifted matters to remote hearings. For example, the Business and Property Courts in the UK have produced a protocol which states that it will normally be possible for all short, interlocutory, or non-witness, applications to be heard remotely. Certain witness cases may also be suitable for remote hearings.⁸ Recently, a trial in a UK Court of Protection case was conducted solely over Skype, to a great degree of success.⁹ In Australia, the Supreme Court of New South Wales has directed that the Registrar's Lists are to be conducted remotely, by the online court, telephone link or videoconference.¹⁰

Arbitral institutions have an important role to play in developing practices and protocols. Most institutional rules grant the tribunal the power to direct the procedure as it wishes; and the onus will now likely be on the party raising an objection to a virtual hearing to explain why it would be untenable under exigent circumstances such those we currently face.

Beyond this, there are a host of refinements and adjustments to be made to tailor traditional procedural safeguards to the virtual hearing setting. How will we address the concern for real-time witness coaching? Will the debate echo traditional discussions of the standards for witness preparation? How will we ensure that witnesses are sequestered where this is appropriate? Will we need to adjust the typical daily hearing schedule now that participants can expect to sit for long periods in front of their monitors? What should be done in the event of technical failures? These are among the practical issues that the international arbitration community will be considering and on which the proactive contributions of arbitral institutions will be welcome.

In developing new approaches, a number of existing soft law instruments will assist.¹¹ Although they do not deal directly with virtual hearings, they offer helpful guidance on examining witnesses by videoconference. For example, the Hague Conference Draft Guide provides an exhaustive discussion of best practice in relation to video-link witness evidence. It considers factors such as time differences

⁶ <https://www.arbitrationplace.com/arbitration-place-virtual-ehearings>

⁷ <https://www.disputescentre.com.au/adc-virtual/>

⁸ <https://www.gov.uk/guidance/coronavirus-covid-19-courts-and-tribunals-planning-and-preparation#telephone-and-video-hearings-during-coronavirus-outbreak>

⁹ <https://www.lawgazette.co.uk/practice/first-all-skype-trial-tests-crisis-working-at-cop-/5103541.article>

¹⁰ http://www.supremecourt.justice.nsw.gov.au/Pages/coronavirus_covid19_announcement.aspx

¹¹ CI Arb Guidelines for Witness Conferencing in International Arbitration (April 2019) <https://www.ciarb.org/news/ciarb-s-new-guidelines-for-witness-conferencing-in-international-arbitration/>; Hague Conference Draft Guide to Good Practice on the Use of Video-Links Under the Evidence Convention (March 2019) <https://assets.hcch.net/docs/e0bee1ac-7aab-4277-ad03-343a7a23b4d7.pdf>; ICC Commission Report on Information Technology in International Arbitration (October 2017) <https://iccwbo.org/publication/information-technology-international-arbitration-report-icc-commission-arbitration-adr/>; and Commentary on the IBA Rules on the Taking of Evidence in International Arbitration (2010).

and operating outside regular business hours;¹² introducing documentary evidence via video link;¹³ a protocol for speaking and interruptions, where there is a delay between the picture and the sound;¹⁴ and advice on room layout, access, acoustics and lighting.¹⁵ The ICC Commission Report provides a sample wording for a pre-hearing order for testimony to be given via videoconference¹⁶ that could be adapted to virtual hearings and issues of technological breakdown.

The future of arbitral hearings?

The Covid-19 pandemic is requiring us all to adapt rapidly and in unprecedented ways to a new reality – one in which the need to develop virtual hearings has been transformed from an option for unusual circumstances to an imperative for us all to address. The genius of arbitration and the international arbitration community is that of innovation. We must all work together to advance the technologies and develop the protocols needed to meet the challenges ahead.

¹² Council on General Affairs and Policy of the Conference, 'Draft Guide to Good Practice on the Use of Video-Link under the Evidence Convention' (Document No 8, Hague Conference on Private International Law, December 2018) 48-9.

¹³ Ibid 52.

¹⁴ Ibid 59.

¹⁵ Ibid 56-8.

¹⁶ ICC Commission on Arbitration and ADR, *Information Technology in International Arbitration* (Report, October 2017) 23.